ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Petitions for Declaratory Ruling filed by Beehive Telephone Company, Inc. and Database Service Management, Inc.	)	NSD File Nos. 99-87 & 99-88
	)	
Toll Free Access Codes	)	CC Docket No. 95-155

To: The Commission

REPLY COMMENTS OF BEEHIVE TELEPHONE COMPANY, INC.

Beehive Telephone Company, Inc. ("Beehive"), by its attorney, and pursuant to the Commission's Public Notice, DA 99-2400 (Nov. 2, 1999), hereby replies to the comments filed in the above-captioned proceedings by MCI WorldCom, Inc. ("MCI"), Sprint Corporation ("Sprint"), and the Bell Operating Companies ("BOCs").

Beehive objects to MCI's inappropriate suggestion that the Commission "return" to the petitions for declaratory ruling after initiating a rulemaking to provide for the neutral administration of toll free numbers. MCI Comments at 11. If it believes yet another rulemaking is necessary, MCI is free to file a petition for rulemaking. However, to link this proceeding to another rulemaking would defeat its purpose.

Beehive and Database Service Management, Inc. ("DSMI") were directed by the United States District Court for the District of Utah, Central Division ("District Court") to facilitate the referral of Beehive's counterclaims to the Commission under the doctrine of primary jurisdiction. The doctrine was invoked at DSMI's urging to obtain the Commission's initial resolution of issues within its special competence. Thus, the Commission has been asked to assist in resolving a dispute

between Beehive and DSMI pending before the District Court. It was not asked to conduct a notice and comment rulemaking.

The District Court obviously must decide the issues by applying the law in effect. Thus, the Commission has been called upon to resolve the issues under the Fifth Amendment, the Communications Act of 1934, as amended ("Act") by the Telecommunications Act Of 1996 ("1996 Act"), and its own rules ("Rules"). The adoption of new rules (which operate prospectively) will be of little, if any, assistance to the District Court. Indeed, new rules will operate primarily to give rise to retroactivity concerns.

The main drawback to the invocation of the primary jurisdiction doctrine is that it invariably causes delay in resolving the dispute before the court. *See* KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 14.6 (3d ed. 1994). Beehive's counterclaims have been pending before the District Court since February 1997. More than ten months have passed since the case was stayed and the matter referred to the Commission. If the Commission defers its decision in this matter to conduct another rulemaking, the resultant costs and delay may well outweigh the benefit of having the Commission resolve the issues within its special competence. *See National Communications Ass'n, Inc. v. AT&T Co.*, 46 F.3d 220, 225 (2d Cir.1995).

Finally, absolutely no need for another rulemaking exists. The Commission has been examining the neutrality of toll free number administration in CC Docket No. 95-155 since October 1995. *See Toll Free Access Codes*, 10 FCC Rcd 13692, 13705 (1995). Including this proceeding, the Commission has sought comment on the issue on five separate occasions. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 16 Communications Reg. (P&F) 947, 951 (1999) (Comm'r Furchtgott-Roth, dissenting). There is no reason for a sixth

round of comments. This is one case where enough really is enough.

Beehive urges the Commission to expedite, not defer, its resolution of the issues referred to it by the District Court. We turn to those issues next.

SMS/800 ACCESS CANNOT BE TARIFFED (COUNT I)

The BOCs have long agreed with Beehive that SMS/800 access service to RespOorgs is not a common carrier service. *See Beehive Tel. Co., Inc. v. The BOCs*, 12 FCC Rcd 17930, 17954 (1997) (adopting *Beehive Tel. Co., Inc. v. The BOCs*, 10 FCC Rcd 10562 (1995)). Consequently, they were forced to make the simplistic argument that, because the Commission ordered them to provide SMS/800 access under tariff, "that is the way it must be provided." BOCs' Comments at 3. Beehive, of course, disagrees. SMS/800 must be provided in accordance with the law. Only common carrier service is subject to tariff regulation under Title II of the Act, and the Commission was without authority to classify access to the SMS/800 as common carriage in order to achieve its pre-determined policy goals. *See, e.g., Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481-83 (D.C. Cir. 1994).

The Commission initially found that SMS/800 access was "incidental" to toll free service (a common carrier transmission service), essentially because that access was "necessary" for the provision of the service. *Beehive*, 12 FCC Rcd at 17957-58. It concluded in 1993 that tariffing SMS/800 access was "necessary to reach the goals of reasonable rates and nondiscriminatory terms." *Id.* at 17958. The Commission suggested its "regulatory scheme" required that SMS/800 access be offered on a common carrier basis and "regulated in the same way" as toll free transmission service. *See id.* at 17960-61. Whatever its legal merit in 1993, the Commission's approach were without foundation once the 1996 Act changed the "regulatory scheme."

The 1996 Act should have been the death knell of SMS/800 access as a "monopoly service" regulated by tariff. *Beehive Tel Co., Inc. v. FCC,* 179 F.3d 941, 944 (D.C. Cir. 1999). It was intended to "foster competition in *all* telecommunications services, including toll free, through neutral numbering administration." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 11 FCC Rcd 19392, 19510 (1996) ("*Local Competition II*") (emphasis original). The 1996 Act did not single out toll free telecommunications service as exempt from the "procompetitive, deregulatory" provisions of § 251. *Id.* at 19398. Moreover, the 1996 Act contains nothing that allows the SMS/800 or its database to be regulated different from any other network element used for the provision of a telecommunications service.

There is an outright conflict between the requirements of § 251 and the BOCs' 800 Service Management System (SMS/800) Functions Tariff F.C.C. No. 1 ("SMS/800 Tariff"). The effect of that conflict is to render the SMS/800 Tariff a "nullity as a matter of substantive law." *Municipal Light Bds. v. FPC*, 450 F.2d 1341, 1346 (D.C. Cir. 1971). Therefore, SMS/800 access cannot be offered under the SMS/800 Tariff.

The SMS/800 is unquestionably a "network element" under the 1996 Act, *see* 47 U.S.C. § 153(29), and an "unbundled network element" ("UNE") under the Rules. *See* 47 C.F.R. § 51.319(e). The SMS/800 is clearly a "service management system" ("SMS") under § 51.319(e)(3) of the Rules. And to the extent it is used for the routing of toll free calls, the SMS/800 database (or the "toll free calling database") is a "call-related database" under § 51.319(e)(2). Because it is not part of the public switched network, the SMS/800 database is also an SMS to the extent it: (1) interconnects with service control points ("SCPs") and sends the SCPs call processing instructions needed to complete toll free calls; and (2) allows telecommunications carriers to enter and store data regarding

the processing and completing such calls. *See id.* § 51.319(e)(i).

The BOCs do not dispute that the SMS/800 is a UNE. Rather, they simply say that SMS/800 access should not brought under the "section 251/252 regime" because that regime is "limited to carriers" and is "designed for individual negotiations between two carriers for services or facilities in a particular geographic area." BOCs' Comments at 3. Those contentions fail to bring SMS/800 access out from under §§ 251 and 252 of the 1996 Act.

When nondiscriminatory access to the SMS/800 or the SMS/800 database is necessary to provide toll free telecommunications service, telecommunications carriers have the *statutory right* to purchase such access from incumbent local exchange carriers ("ILECs") on reasonable rates and nondiscriminatory terms under negotiated, mediated or arbitrated agreements. *See* 47 U.S.C. §§ 251(c)(3), 252(a), (b). Beehive, MCI and Sprint are telecommunications carriers, as well as RespOrgs. They require access to the SMS/800 database to enter their subscriber records and routing instructions to provide toll free service. If they request such access, Southwestern Bell Telephone Company ("SWBT") would have the duty, as an ILEC and the owner and manager of the SMS/800 database,[1/] to negotiate in good faith an agreement under which it would provide the requesting telecommunications carriers with access to the database on an unbundled basis on reasonable and nondiscriminatory rates, terms and conditions. *See* 47 U.S.C. § 251(c)(1), (3); 47 C.F.R. § 51.301(a).

1/ During litigation with Beehive, the BOCs claimed to jointly own the SMS/800. However, Beehive learned that the BOCs jointly do not own any of the facilities used to provide SMS/800 access service. SWBT owned the mainframe computer and provided the database, as well as administrative, operational and network support. In 1998, SWBT still was providing operational support and the hardware for the SMS/800 software system and actually running the database. *See* Comments of MCI Telecommunications Corp. at 9, CC Docket No. 95-155 (July 1, 1998).

If the SMS/800 database system is accessible as an UNE under § 251(c), then SMS/800 access service to telecommunications carriers cannot be provided as a common carrier telecommunications service pursuant to a tariff filed under § 203 of the Act. The procompetitive, deregulatory requirements of § 251(c) are wholly inconsistent with tariff regulation under § 203.

Section 203 embodies the filed-rate doctrine, under which the tariffed rates become the legal rates that must be charged to all customers alike. *See Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990). Until tariffed rates are changed, an ILEC may not negotiate different rates for the tariffed service. *See id.* at 131. The same is true with respect to all the terms and conditions of the service offering that are "covered" by the tariff. *See AT&T v. Central Office Tel., Inc.*, 118 S.Ct. 1956,1964 (1998). In those respects, the filed-rate doctrine, which is at the heart of tariff regulation, conflicts directly with the duty to negotiate imposed by § 251(c)(1) of the 1996 Act. *See* 47 U.S.C. § 251(c)(1).

If Beehive requests access to the SMS/800 database to enter its subscriber records and routing instructions, § 251(c)(1) requires SWBT to negotiate in good faith the rates, terms and conditions under which Beehive may gain access to the database. However, as one of the carriers that issued the SMS/800 Tariff, SWBT would be subject to criminal and civil penalties if Beehive obtained access to the SMS/800 database on rates, terms and conditions other than those published in the SMS/800 tariff. *See* 47 U.S.C. §§ 203(c), (e), 501, 503(a). On the other hand, if it adheres to the tariff and refuses to negotiate, SWBT faces criminal and civil penalties for violating § 251(c)(1) of the 1996 Act and § 51.301(a) of the Rules. *See id.* §§ 251(c)(1), (3), 502, 503(b). Thus, compliance with both § 251(c) and the SMS/800 Tariff is impossible for SWBT.

Where a patent conflict exists between the requirements of the Act and a tariff, the statute

must prevail. *See Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204-5 (D.C. Cir. 1994) (tariff "patently null" under § 201(b) of the Act). Because it conflicts with the access requirements of § 251(c), the SMS/800 Tariff effectively has been "preempted." *Cf., MCI Telecomms. Corp. v. GTE Northwest, Inc.*, 41 F.Supp.2d 1157, 1177-78 (D. Or. 1999) (state tariff preempted by § 251(c)). The Commission should invalidate the SMS/800 Tariff and declare that access to the SMS/800 database must be provided as required by § 251(c) of the 1996 Act. It should leave the question of how that access is to be provided to its ongoing toll free proceeding in CC Docket 95-155.

DSMI IS NOT AN IMPARTIAL NUMBER ADMINISTRATOR (COUNT II)

Section 251(e)(1) of the 1996 Act mandates that the Commission "shall create or designate one or more impartial entities to administer telecommunications numbering." 47 U.S.C. § 251(e)(1). When it implemented the 1996 Act, the Commission decided that impartial toll-free number administrator must be "unaligned with any particular segment of the telecommunications industry." *Local Competition II*, 11 FCC Rcd. at 19509. Now, the "neutrality criteria" for an impartial and unaligned number administrator are spelled out in the Rules. *See* 47 C.F.R. § 52.12(a)(1). Neither DSMI nor the BOCs qualify to be an impartial number administrator under the Commission's criteria.

In October 1997, the Commission finally recognized that "toll free number database administration" by DSMI was "inconsistent" with § 251(e)(1) of the 1996 Act. *Administration of the N. Am. Numbering Plan*, 12 FCC Rcd 23040, 23094 (1997) ("*NANP Administration*"). That decision is significant as the Commission's acknowledgment that the administration of the SMS/800 database is governed by § 251(e)(1). Thus, the Commission tacitly recognized that toll free numbers are administered by DSMI under the SMS/800 Tariff, despite claims by the BOCs and DSMI to the

contrary. *See NANP Administration*, 12 FCC Rcd at 23091-92.

The BOCs still allude to some industry disagreement about "whether SMS/800 service is 'number administration.'" BOCs' Comments at 5. However, examination of the SMS/800 Tariff leaves no room for disagreement. Under the tariff, the BOCs state that toll free numbers (the tariff uses the term "800" to include all toll free numbers) are "administered through the SMS/800." SMS/800 Tariff § 2.1. They hold themselves out as undertaking to provide 800 "number administration," *see id.* § 2.1.4, which the tariff defines as the "process of assigning, reserving, and releasing 800 telephone numbers for public use." *Id.* § 2.7. Standards for "800 number administration" are set out throughout the tariff.[2/] Finally, the tariff imposes a monthly per-number "customer record administration" ("CRA") charge of $0.37 for administrative services, including "number search and reservation functions, as well as activation and modification of 800 numbers." *Id.* at § 4.1.2(C), 4.2(B). It is frivolous, therefore, to suggest that SMS/800 service is not number administration.

Sprint and MCI both see that the current administration of toll free numbers violates the impartiality requirement of § 251(e)(1). Sprint limits the violation to the management of the SMS/800 under the control of the SMS Management Team ("SMT"), which "is *not* a neutral entity." Sprint Comments at 1 (emphasis original).[3/] MCI take a more expansive view. It suggests the cumulative effects of the administrative functions performed by the BOCs, the SMT, the SMS/800 Tariff, and DSMT are "wholly inconsistent" with the neutrality requirements of § 251(e)(1). *See*

[2/] *See* SMS/800 Tariff §§ 2.1.4, 2.1.7, 2.2.2, 2.3.1(A), 2.3.2(A).

[3/] Sprint is clearly correct, especially since the BOCs admit they administer the SMS/800. *See* BOCs' Comments at 5.

MCI Comments at 7. Strangely enough, MCI nevertheless "urges the Commission to continue the tariff arrangement" on an interim basis. *Id.* at 9. Beehive submits that the Commission cannot allow the tariff arrangement to continue without violating its duties under § 151 of the Act and § 251(d)(1) of the 1996 Act.

The Commission has the statutory duty to "execute and enforce" the provisions of the Act, including § 251(e)(1). 47 U.S.C. § 151. It also had the statutory obligation to "complete all actions necessary to implement the requirements" of § 251(e)(1) by August 8, 1996. 47 U.S.C. § 251(d)(1). The Commission has been in knowing violation of those duties since October 1997, when it concluded in a rulemaking that toll free number database administration, as then "structured," is inconsistent with § 251(e)(1). In fact, the Commission has not only failed to enforce § 251(e)(1), it has formally authorized its violation.

The "structure" of toll free number administration found unlawful in October 1997 was codified in April 1997, when the Commission adopted Subpart D of Part 52 of the Rules. *See Toll Free Service Access Codes*, 12 FCC Rcd 11162, 11260-65. Under Subpart D, the "Service Management System Database" (the SMS/800) is defined as the "administrative database system for toll free numbers" or a "computer system" that enables RespOrgs to enter data about the toll free numbers under their control. 47 C.F.R. § 52.101(d). Subpart D formally recognized DSMI's authority as the toll free number administrator under the SMS/800 Tariff. It explicitly provides that only DSMI can assign the "unavailable status" to a toll free number or remove that status from a number. S*ee id.* § 52.103(f). Moreover, Subpart D requires (as an exercise of the Commission's obligations under § 251(e)) the BOCs to include in the SMS/800 Tariff provisions: (1) prohibiting the warehousing of toll free numbers by RespOrgs and subjecting violators to penalties, *see id.* §

52.105(e); and (2) stating the Commission's conclusion that the hoarding and sale of toll free numbers are contrary to the public interest. *See* 47 C.F.R. § 52.107(b). Thus, after its deadline passed to establish regulations implementing § 251(e)(1), the Commission adopted rules authorizing the pre-1996 Act functions of the BOCs, DSMI and the SMS/800 in the administration of toll free numbers as a "monopoly service."

Six months later, in the same order in which it declared the structure of toll free number administration violated § 251(e)(1), the Commission adopted a neutrality rule for the impartial North American Numbering Plan Administrator ("NANPA") and the Billing and Collection Agent ("B&C Agent") that if applied to the BOCs and DSMI would have disqualified them from toll free number administration. *See NANP Administration*, 12 FCC Rcd at 23103-4. Moreover, the Commission implemented § 251(e)(1) with respect to ordinary telephone numbers by designating Lockheed Martin IMS ("Lockheed") as the NANPA and NECA as the B&C Agent. *See id.* at 23042. Toll free numbers were conspicuously missing from the list of "numbering resources" that would be administered impartiality by Lockheed and NECA. *See id.* at 23108. While it was adopting rules to implement § 251(e)(1) with respect to ordinary toll free numbers, the Commission decided to let stand its Subpart D rules for toll free numbers that it recognized as inconsistent with § 251(e)(1). *See id.* at 23090.

By allowing the administration of toll free numbers to continue under the SMS/800 Tariff, the Commission gave its imprimatur to the BOCs, the SMT and DSMI to administer numbers unlawfully. So long as the SMS/800 Tariff remains in effect, the administration of toll free numbers will be under the legal control of entities not meeting the Commission's neutrality standards. *See* 47 C.F.R. § 52.12(a).

The SMS/800 Tariff constitutes the law, *e.g.*, *MCI Telecomms. Corp.* v. *Graham*, 7 F.3d 477, 479 (6th Cir. 1993), as to all subjects specifically addressed by the tariff, *see AT&T*, 118 S.Ct. at 1964, including the regulations governing toll free number administration. *See supra* p.8. By being allowed to publish the SMS/800 Tariff regulations, the BOCs effectively establish the law that "conclusively and exclusively" controls toll free number administration. *See MCI*, 7 F.3d at 479. Hence, the law governing the administration of these numbers is established by telecommunications service providers owned by Regional Bell Operating Companies ("RBOCs")[4/] that are aligned with an industry segment and cannot meet the Commission's fundamental neutrality criteria. *See* 47 C.F.R. § 52.12(a)(1). Neither can the SMT or DSMI.

Day-to-day control over DSMI is exercised by the SMT, which is comprised of representatives from each of the RBOCs. Through the SMT, the RBOCs have the power to direct the management and policies of DSMI. *See* 47 C.F.R. § 52.12(a)(i)(C). DSMI's President, Michael J. Wade, testified in the District Court that DSMI operates as an agent for the RBOCs under a contract with the RBOCs.[5/] Mr. Wade also testified that he actually works for the RBOCs under the direction of the SMT.[6/]

DSMI is not impartial when it acts as the agent of the BOCs under the SMS/800 Tariff. In that capacity, DSMI bills RespOrgs the monthly CRA charges to recover the costs of toll free

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[4/] *See* Initial Brief of Bell Company Intervenors in Support of Respondents at i-iv, *Beehive Tel. Co., Inc. v. FCC*, 179 F.3d 941 (D.C. Cir. 1999) (No.97-1662).

[5/] Transcript of Motion for Temporary Restraining Order at 68, *Database Service Management, Inc.* v. *Beehive Telephone Co., Inc.*, No. 2:96CV 0188C (D. Utah June 13, 1996).

[6/] *See id.* at 99, 108.

number administration. As it demonstrated when it sued Beehive in District Court, DSMI collects the payment of CRA charges. Thus, DSMI at least functions as the B&C Agent for toll free number administration. *See* 47 C.F.R. § 52.16(a). Yet, the legal control exercised by the RBOCs and the BOCs over DSMI goes far beyond the Commission's "undue influence criterion." *Id.* § 52.12(a)(1)(iii).

That Sprint, for example, believes that DSMI's performance as the impartial SMS/800 database has been "satisfactory" is immaterial. Sprint Comments at 1. The issue in this proceeding, and before the District Court, is whether DSMI meets the impartiality requirement of § 251(e)(1) and is eligible to function as a toll free number administrator. The Commission concluded in 1997 that DSMI did not. It must conclude the same today, because the change in DSMI's ownership does not alter the fact that it cannot meet the Commission's neutrality criteria for impartiality. Regardless of DSMI's performance, or any policy or practical consideration, the Commission is bound by law to enforce and implement § 251(e)(1) and its own Rules.

TOLL FREE NUMBER ADMINISTRATION VIOLATES § 251(e)(2) (COUNT III)

Section 251(e)(2) of the 1996 Act commands that the "cost of establishing telecommunications numbering administration . . . *shall* be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission." 47 U.S.C. § 251(e)(2) (emphasis added). MCI agrees with Beehive that the SMS/800 Tariff violates the requirement of § 251(e)(2). *See* MCI Comments at 9. It also alleges that the tariffed charges are "grossly in excess of the amount need to pay for toll free administration." *Id.* Beehive agrees with that also. As noted, however, MCI wants the Commission to continue the existing tariff arrangement until toll free number administration is brought in line with § 251(e)(1). *See id.* Beehive submits that the

Commission may not lawfully allow the costs of toll free number administration to continue to be collected under the SMS/800 Tariff for the same reasons it must invalidate the tariff and declare DSMI ineligible an a number administrator.

First and foremost, the Commission must obey the § 251(e)(2) command that the costs of toll free number administration shall be borne by "all telecommunications carriers." The Commission interpreted § 251(e)(2) to require only telecommunications carriers to contribute to the costs of number administration. *See Local Competition II*, 11 FCC Rcd at 19541. The rule implementing the cost-recovery requirement of § 251(e)(2) now provides: (1) all telecommunications carriers shall contribute to the costs of establishing numbering administration on a competitively neutral basis; and (2) such contributions shall be based on end-user telecommunications revenues. *See* 47 C.F.R. § 52.17.

When it adopted its current rule, the Commission decided that collecting contributions to the "NANP cost recovery" on the basis of end-user telecommunications revenues satisfied § 251(e)(2) requirements. *Streamlined Contributor Reporting Requirements*, 16 Communications Reg. (P&F) 688, 703 (1999). Moreover, it decided it would reduce carrier confusion and foster administrative efficiency to employ the same funding basis for the cost recovery mechanisms for local number portability, the Telecommunications Relay Services Fund, and federal universal service support. *See id.* at 704. Of course, end user telecommunications revenues is not the funding basis for toll free number administration. Rather, the cost of toll free number administration is recovered primarily from the monthly CRA charges to RespOrgs.

MCI recognizes that the recovery of number administration costs through the SMS/800 Tariff offering violates § 251(e)(2). *See* MCI Comments at 9. The costs of toll free number administration

obviously are not borne by all of the approximately 3,500 telecommunications carriers operating today. They are recovered only from the RespOrgs and SCP owners that use the SMS/800. The bulk of those costs are recovered currently from approximately 240 RespOrgs that may or may not be telecommunications carriers.[7] According to the cost support material for the June 1998 SMS/800 Tariff filing, 88% ($64,716,026) of the future year (June 20, 1998 to June 19, 1999) total revenue requirement ($73,462,611) for the SMS/800 would be recovered through CRA charges to RespOrgs.[8] Regardless, the costs of toll free number administration are being borne by a handful of telecommunications carriers. That alone violates § 251(e)(2).

The SMS/800 Tariff does not recover number administration costs on a competitively neutral basis. Under the tariff, costs are allocated among rate elements at the direction of the BOCs. Costs are recovered based on use of the SMS/800 by RespOrgs and SCP owners, not on the basis of the revenues generated by that usage. For example, RespOrgs incur the monthly $.37 per number CRA charge irrespective of whether the number is used by a toll free service subscriber. *See* SMS/800 Tariff § 4.1.2(C). Consequently, the relatively few telecommunications carriers that are RespOrgs bear 88% of the costs of toll free number administration without regard to their end-user telecommunications revenues. In contrast, more than 3,000 telecommunications carriers contribute nothing at all to toll free number administration, even though some of them may receive substantial end-user revenues from the provision of toll free service. A cost recovery mechanism that produces

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[7] Any entity that meets certain eligibility criteria may serve as a RespOrg. *See Beehive,* 12 F.C.C.R. at 17932 n.8.

[8] *See* Reply to Opposition of the Federal Communications Commission to Petition for Writ of Mandamus at App. 32, *Beehive Tel Co., Inc.*, D.C. Cir. No. 99-1140 (July 1, 1999).

such results is neither equitable nor competitively neutral.

The costs of toll free number administration are being recovered under the SMS/800 Tariff exactly as they were in 1993. It is perfectly clear that as a cost recovery mechanism the SMS/800 Tariff was overtaken by § 251(e)(2) of the 1996 Act . It is equally clear that the Commission has done nothing to implement § 251(e)(2) with respect to toll free numbers, and that the SMS/800 Tariff is patently at odds with the Commission's cost recovery rule. The Commission must either acknowledge that the SMS/800 does not comply with § 251(e)(1) or explain how the 1996 Act permits it to treat toll free numbers differently than all other numbering resources.

DSMI WILLFULLY VIOLATED THE ACT (COUNT IV)

Count IV of Beehive's amended counterclaim alleges that DSMI violated §§ 201 and 202 of the Act and § 251(c) of the 1996 Act based on its refusal to serve Beehive, or negotiate with Beehive, once the amount in dispute in the litigation was paid. None of the commenters addressed those allegations. Sprint and the BOCs commented on whether DSMI could legally discontinue providing SMS/800 service. *See* Sprint Comments at 2; BOCs' Comments at 5. However, Beehive has not raised that issue and does not seek a declaratory ruling on the question.

DSMI CANNOT ENFORCE THE SMS/800 TARIFF (COUNT V)

Beehive alleges in Count V that DSMI is judicially estopped from regulating 800 number administration under the SMS/800 Tariff, because it admitted in a pleading that it was not a common carrier. The commenters did not address that allegation.

Sprint makes the point that carriers commonly employ agents to enforce provisions of their tariffs. *See* Sprint Comments at 2-3. Beehive does not dispute that point. The BOCs deny that DSMI administers the SMS/800 system, but admit that they hired DSMI "to assist them in the

provision of their services." BOCs' Comments at 5. Beehive believes that DSMI functions as a toll free number administrator even if the BOCs administer the SMS/800 system. *See supra* pp. 7-12.

DSMI VIOLATED THE SMS/800 TARIFF (COUNT VI)

Count VI is based on the allegation that DSMI violated SMS/800 Tariff requirements when it disconnected Beehive's 800 numbers without notice or cause. No comments were received on this issue. However, it is noteworthy that the BOCs did not defend DSMI's conduct.

DSMI VIOLATED BEEHIVE'S DUE PROCESS RIGHTS (COUNT VII)

With respect to Beehive's constitutional claim, Sprint argues that carriers do not "own" toll free codes or numbers. *See* Sprint Comments at 3. However, Beehive never claimed that it owned the block of 800 numbers (800-629-xxxx) that was at the center of its dispute with DSMI. Nor did Beehive ever treat the 800 numbers as if it owned them.[9/] On the other hand, Beehive has claimed that those numbers (which were assigned to it in May 1989) had substantial marketing value by virtue of the mnemonic appeal of 1-800-MAX or 1-800-MAY (which are the dialing equivalents of 629).[10/] Beehive has also claimed that the loss of the numbers deprived it of the substantial good-will value it had built with respect to its 800-MAX numbers, and resulted in lost business and business opportunities.[11/]

9/ Beehive certainly never warehoused 800 numbers. Every 800-629 number was assigned and in use. However, prior to the development of the national database system, Beehive developed a system that routed all the 800-629 calls to its tandem switch at Wendover, where they were password verified, and then routed to the destination numbers. The way the system operated made it appear that Beehive was using all the numbers. That eventually led to unwarranted allegations that Beehive was warehousing numbers.

10/ *See* Brief for Petitioners at 5 n.2, *Beehive* (No. 97-1662).

11/ *See* Reply Brief for Petitioners at 7, *Beehive* (No. 97-1662)

The BOCs contributed little to assist the Commission and ultimately the District Court in resolving Beehive's Fifth Amendment claim. They contend that there be no constitutional claim in this case, because of Commission holdings to the effect that a carrier cannot have a property right in telephone numbers. BOCs' Comments at 6. The issue clearly is not that simple.

The Commission has acknowledged that whether a Fifth Amendment taking has occurred requires a balancing of competing interests and depends largely on the particular circumstances of the case. *See North American Numbering Plan*, 12 FCC Rcd 17876, 17910 (1998). Factors to be considered include the character of the governmental action and its economic impact on the claimant. In that connection, the extent to which the action interferes with "distinct investment-backed expectations" is "particularly relevant in examining the economic impact" on the claimant. *Id.* Thus, Beehive's claim cannot be resolved summarily on the basis of the Commission's policy determination that carriers cannot have property rights in numbering resources.

Beehive maintains that it was deprived of a property interest when DSMI disconnected its 800-MAX numbers. Although numbers are a public resource, the opportunity to make use of numbers has value which may not simply be taken away. The Commission has acknowledged the commercial importance and value of 800 numbers..[12/] Further support for the proposition that 800 numbers have attributes of property comes from a proposal that the Commission should auction these numbers to raise funds.[13/] And in response to Beehive's claims, the D.C. Circuit Court of

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[12/] *See, e.g., Provision of Access for 800 Service*, 102 F.C.C.2d 1387, 1389 (1986) (describing use of 800-CLUB-MED for "marketing purposes"); *Provision of Access for 800 Service*, 3 FCC Rcd 721, 724-25 (1988) (acknowleding "commercially attractive 800 numbers");*Provision of Access for 800 Service*, 4 FCC Rcd 2824, 2826 (1989) (same).

[13/] *See 800-Number Marketers Dial 888-Not-Fair*, THE WALL STREET JOURNAL, Mar. 7, 1997).

Appeals recently recognized that a business can create "substantial goodwill in a toll-free number through its advertising and use" and that certain 800 numbers have "substantial marketing value because of its mnemonic appeal." Beehive, 179 F.3d at 942-43. The Commission should consider the commercial value of Beehive's 800-MAX when it reviews the Fifth Amendment arguments submitted to the District Court.

Respectfully submitted,

BEEHIVE TELEPHONE COMPANY, INC.

Russell D. Lukas
Its Attorney

Lukas, Nace, Gutierrez & Sachs, Chartered
1111 19th Street, NW, Suite 1200
Washington, DC 20036
(202) 857-3500

December 16, 1999

CERTIFICATE OF SERVICE

I, Catherine M. Seymour, a secretary in the law firm of Lukas, Nace, Gutierrez & Sachs, Chartered, do hereby certify that I have on this 16th day of December, 1999, sent by first class U.S. mail copies of the foregoing "REPLY COMMENTS OF BEEHIVE TELEPHONE COMPANY, INC." to the following:

Network Services Division
Federal Communications Commission
445 12th Street, S.W., Room 6-A207
Washington, D.C. 20554

Henry G. Hultquist, Esquire
Mary De Luca, Esquire
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Attorneys for MCI WorldCom, Inc.

Leon M. Kestenbaum, Esquire
Norina T. Moy, Esquire
1850 M Street, N.W., Suite 110
Washington, D.C. 20036
Attorneys for Sprint Corporation

John M. Goodman, Esquire
1300 I Street, N.W.
Washington, D.C. 20005
Attorney for Bell Atlantic

Angela Brown, Esquire
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309
Attorney for BellSouth Telecommunications, Inc.

Mary Royer, Esquire
1401 I Street, N.W.
Washington, D.C. 20005
Attorney for SBC Communications

Catherine M. Seymour